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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1434

HARRY J. AMELL, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, pp. 13–24) is reported at 390 F. 2d 880.

JURISDICTION

The judgment of the Court of Claims was entered on February 16, 1968. The petition for a writ of certiorari was filed on May 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, under the Classification Act of 1949, which provides that the "compensation" for maritime officers employed on vessels operated by the United States shall be fixed and adjusted "from time to time as

nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry," and under the Federal Employees Pay Act of 1945, which provides that such employees "may be compensated in accordance with the wage practices of the maritime industry," the United States is required to grant its maritime officers an increase in base wages equivalent to an increase in contributions made by the maritime industry to the pension and welfare plan for its employees.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Classification Act of 1949, 5 U.S.C. 1082(8) (1964 ed.) (now 5 U.S.C. 5102(c)(8) and 5342(a) (1966 rev.)) and the Federal Employees Pay Act of 1945, 5 U.S.C. 946 (1964 ed.) (now merged into 5 U.S.C. 5342(a) and (b) (1966 rev.)), as well as the relevant regulations of the Department of the Navy, are set forth in the Appendix, *infra*, pp. 15–16.

STATEMENT

Petitioners are 67 licensed marine engineer officers employed aboard vessels operated by the Military Sea Transportation Service (MSTS) of the Department of the Navy. They brought suit in the Court of Claims seeking sums allegedly due them under the provisions of the Federal Employees Pay Act of 1945 and the Classification Act of 1949.

Petitioners' compensation is governed by the Classification Act, *infra*, p. 15, which provides that the

"compensation" of officers and members of crews of vessels

> * * * shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

Additionally, the Federal Employees Pay Act of 1945, *infra*, p. 15, provides that:

> Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, * * * may be compensated in accordance with the wage practices of the maritime industry.[1]

According to the implementing regulations of the Department of the Navy for determining prevailing rates and practices, "[s]pecific industry rates and practices *per se* are not always directly transferable to MSTS marine positions because of variations among pay rates and practices in the maritime industry itself, and differing pay practices between industry and the government."[2] Where fringe benefits exist in private industry, various factors are to be taken into account in determining their applicability to MSTS employees, *e.g.*, whether exclusion of a particular benefit from the MSTS employees "is sufficiently compensated for by application of privileges and benefits accorded civil service employees not matched in the industry." The collective bargaining

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[1] The Department of the Navy took over operation of vessels formerly operated by the Transportation Corps of the Army under a directive dated August 2, 1949, issued by the Secretary of Defense. See 14 F.R. 5203.

[2] See Civilian Marine Personnel Instructions (CMPI) 531.1–3 set forth in full, *infra*, pp. 15–16.

agreement negotiated[3] between the government and the union to which the petitioners belong—the National Marine Engineers Beneficial Association (MEBA)—was expressly made subject to these provisions (R. 163, 22).[4]

Prior to 1962, whenever the private shipping companies, pursuant to collective bargaining agreements with MEBA, increased the base wages of their licensed marine engineers, the Department of the Navy increased petitioners' base wages in exactly the same amount. During this time, the private shipping companies also contributed specified sums to the MEBA Pension and Welfare Plan.[5] The Department of the Navy, however, at no time took these contributions into account in determining the base wages of MSTS employees (R. 16, 139, 140, 148). Rather, the MSTS employees received their pension benefits under the Civil Service Retirement Act, 5 U.S.C. 2251 (1964 ed.).[6]

In accordance with a 1961 collective bargaining agreement between the private shipping companies and MEBA (R. 138), the union was authorized to request "wage reviews" on June 15, 1962, and on June 15, 1963, not to exceed an adjustment of more than 3½% of "base wages" at either time. The employees had the right to decide whether resulting increases in benefits would be applied to base wages or be deposited in the MEBA Pension and Welfare Plan.

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[3] Pursuant to Exec. Ord. No. 10988, 27 F.R. 551.

[4] "R" refers to the record in the Court of Claims.

[5] The licensed maritime engineers in private industry made no contribution themselves to their Plan.

[6] Now 5 U.S.C. 8331 (1966 rev.).

After the June 1962 wage review, the employees voted to have the entire 3½% increase put into the Pension and Welfare Plan. Accordingly, the agreement between MEBA and the companies, effective June 16, 1962, provided that the companies would increase their contributions to the Pension and Welfare Plan by $0.865 per day per licensed engineer—a contribution equivalent to 3½% of their base wages; there was no increase in the wages paid to the employees.

The Department of the Navy made no changes in the base wages of the petitioners as a result of this agreement in the private sector of the industry.[7]

MEBA, as representative of petitioners and other MSTS licensed engineers, protested to the Secretary of the Navy the failure to increase the base wages of the MSTS employees as a result of the 1962 pension fund increases by the private companies. This request was denied by the Secretary of the Navy, in a letter to MEBA which stated (R. 24(A)):

> * * * It is the view of the Department that the increases of which you write do not represent wages paid to the members of your organization but rather are increments in pension

[7] In the second wage review between MEBA and the private companies, the agreement, effective June 16, 1963, provided that the entire amount of the increase in the employers' contribution—equivalent to 3½ percent of base wage—would be used to increase the basic monthly wages of certain employees, and to pay additional compensation for non-watchstanding, overtime, and related services. Consequently, the Department of the Navy approved similar changes in the base wages of its employees, effective as of June 16, 1963. These changes are not at issue here.

> and educational benefits. As you know, regular civilian marine employees of the Military Sea Transportation Service are covered by the Civil Service Retirement Act, and the employer pays sizable amounts into the retirement fund. Furthermore, the Congress, from time to time, appropriates substantial sums into this fund.
>
> We have in the past conformed and shall continue in the future to conform with the letter and spirit of law controlling our Military Sea Transportation Service wage policy. However, it must be made clear that benefits negotiated in the commercial sector and not paid as wages cannot be accepted for comparability pay adjustment by the Department. A contrary view would lead the Navy into the untenable position of effecting compensation exceeding, in fact, that of the maritime industry.

The General Accounting Office subsequently approved the Secretary's decision.

Following the Secretary's determination, petitioners brought this action in the Court of Claims,[5] alleging violations of the Classification Act of 1949 and the Federal Employees Pay Act of 1945 and seeking an accounting and damages of $100,000. The court found

[5] The case was first brought in the Court of Claims in 1964. The Court of Claims, believing the case to be within the original admiralty jurisdiction, ordered it transferred to the United States District Court for the Southern District of New York. On certiorari, however, this Court held (*Amell* v. *United States*, 384 U.S. 158) that the cause of action is one to recover civilian pay under the Tucker Act, 28 U.S.C. 1346, 1491, and that the proper forum was the Court of Claims. Consequently, the case was remanded to the Court of Claims for a decision on the merits, and it is that decision, rendered February 16, 1968, which is now at issue here.

that Congress used the word "compensation" in the Classification Act so as not "to cover either the whole ambit of employment costs or those in issue here". Rather, the term "compensation", as used in the Classification Act and the Federal Employees Pay Act, means only the subject matter of those acts—wages and salary—and not fringe benefits, which are provided to federal employees under separate legislation. Accordingly, the instant claims were denied. As an additional ground for upholding the Secretary, the court ruled that assuming, without deciding, that the Secretary of the Navy had some degree of discretion under the statutes to allow the wage increases, he did not abuse that discretion in denying the wage increases to the MSTS employees.

ARGUMENT

1. The Court of Claims' analysis of the congressional understanding of the term "compensation" in the pertinent acts is clearly sound. See Pet. App. A, pp. 20–22. The relationship between the Classification Act and the Federal Employees Pay Act, on the one hand, and the various "fringe benefit" statutes, on the other, makes it plain that in the acts petitioners rely on Congress was concerned about establishing an approximate parity in basic "wages" when it spoke of "compensation" for the government's marine employees. Surely, the Classification Act was not intended to give the Secretary of the Navy power to increase employees' *benefits* under the Civil Service Retirement Act and other such acts. Yet, if the word "compensation" in the Classification Act were inter-

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preted as including pension benefits, that would be the grant of power contained in the Classification Act.

Petitioners' contention that this construction of the acts conflicts with the decisions in *United States* v. *Carter*, 353 U.S. 210, *W. W. Cross & Co.* v. *National Labor Relations Board*, 174 F. 2d 875 (C.A. 1), and *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960, affirmed on other grounds *sub nom. American Communications Ass'n* v. *Douds*, 339 U.S. 382, is erroneous. In those cases, it was held, in the context of other statutory plans, that the words "compensation" or "wages" included contributions to pension and welfare funds and similar benefits in addition to base wages. None of these holdings involved an interpretation of the Classification Act of 1949 and the Federal Employees Pay Act of 1945, which must of course be construed in their special framework of providing only a portion of the total benefits received by federal employees. Compare *United States* v. *Embassy Restaurant*, 359 U.S. 29, where, in the context of the Bankruptcy Act, the word "wages" was held not to include contributions by an employer to a union welfare fund. See, also, *Joint Industry Board* v. *United States*, No. 616, this Term, decided May 20, 1968.

2. In addition, in our view the Secretary of the Navy—regardless of what content is given the term "compensation"—possesses a measure of discretion as to increases in compensation; that discretion, as the court below alternatively held (Pet. App. A, p. 23), was not abused in this case. Under the Classification Act of 1949 the Secretary of the Navy is to fix and adjust petitioners' "compensation * * * from time to

time *as nearly as is consistent with the public interest* in accordance with prevailing rates and practices in the maritime industry"; and under the Federal Employees Pay Act, petitioners *"may be* compensated in accordance with the wage practices of the maritime industry" (emphasis added). Whatever "compensation" may cover, this language strongly suggests that the Secretary has some discretion in fixing and adjusting petitioners' wages.

The reason for avoiding an inflexible requirement of automatic equivalence between the private and governmental sectors results from the exceeding complexity of the problem of comparability. Indeed, exact comparability in total remuneration between petitioners and their counterparts in private industry is, from a practical standpoint, virtually impossible. For example, the Classification Act of 1949 and the Federal Employees Pay Act of 1945 are only two of many statutes affecting the total amount of financial benefits petitioners receive. As this Court observed on the prior review, *Amell* v. *United States,* 384 U.S. 158, 160, they also are covered by statutes such as the Civil Service Retirement Act,[9] the Federal Employees' Group Life Insurance Act,[10] the Federal Employees Health Benefits Act,[11] and the Annual and Sick Leave Act.[12] Employees in private industry generally receive, in greater or lesser degree, similar benefits under their

[9] 5 U.S.C. 2251 (1964 ed.) (now 5 U.S.C. 8331 (1966 rev.)).
[10] 5 U.S.C. 2091 (1964 ed.) (now 5 U.S.C. 8701 (1966 rev.)).
[11] 5 U.S.C. 3001 (1964 ed.) (now 5 U.S.C. 8901).
[12] 5 U.S.C. 2061 (now 5 U.S.C. 6301 (1966 rev.)). See also *e.g.*, the Federal Employees' Compensation Act, 5 U.S.C. 751 (1964 ed.), now 5 U.S.C. 8101 (1966 rev.).

collective bargaining agreements. However, each time an increase in such benefits in private industry takes place under the collective bargaining agreement, the Navy obviously cannot reflexively follow suit and increase the analagous non-wage benefits for its employees—only Congress, by amending the above statutes, can increase these benefits. On the other hand, if because of its inability to pursue that course, the Navy instead increased base wages to reflect each increase in non-wage benefits in private industry, then by parity of reasoning, the maintenance of such mirror-exactness in overall benefits would compel the Secretary to *reduce* the wages of Navy employees whenever Congress by statute increased non-wage benefits. If such reductions were not made, the total remuneration of federal employees, counting all benefits, would be higher than that of their private-industry counterparts. This undeniable and unintended consequence demonstrates the fallacy in petitioners' reading of congressional handling of this field.

It was, no doubt, to avoid the anomaly that the wages of federal maritime employees would be constantly fluctuating in two directions—up and down—that the Classification Act of 1949 and the Federal Employees Pay Act of 1945 are couched in language affording room for discretion. As this Court observed in *Amell* v. *United States, supra,* 384 U.S. at 162: "The wage scale of government-employed seamen is fixed by federal agencies; *it is not automatically adjusted to the rate of pay prevalent in private industry* * * *" (emphasis added).

The Secretary clearly acted reasonably in this case. He took the view that the 1962 increases in the pension benefits of the maritime officers in private industry

> do not represent wages paid to the members of your organization but rather are increments in pension and educational benefits. As you know, regular civilian marine employees of the Military Sea Transportation Service are covered by the Civil Service Retirement Act, and the employer pays sizable amounts into the retirement fund. Furthermore, the Congress from time to time, appropriates substantial sums into this fund.
>
> * * * * *
>
> [I]t must be made clear that benefits negotiated in the commercial sector and not paid as wages cannot be accepted for comparability pay adjustment by the Department. A contrary view would lead the Navy into the untenable position of effecting compensation exceeding, in fact, that of the maritime industry. [R. 24(A).]

This ruling, in accordance with established past policy, merely effectuates the judgment that exact comparability in total remuneration is an unworkable and unintended objective in establishing wage rates. Consequently, the line must be drawn somewhere between those increases in total benefits in private industry which will prompt increases in wages of similar federal employees, and those increases by private industry which will not. The Secretary has drawn the line between base wage increases on the one hand, and pension benefits on the other. Whether or not Con-

gress has *compelled* that the line be drawn at this point (see Point 1, *supra*, pp. 7–8), this distinction is plainly a reasonable one, for, as the Secretary pointed out, these federal employees receive benefits under the Civil Service Retirement Act analogous to the pension benefits in private industry.

Petitioners place emphasis (Pet. p. 10) on the fact that the increase in the pension benefits paid by private industry was made only after "the MEBA membership in its sole discretion determined to apply such increase to the MEBA Pension and Welfare Plan."[13] We fail to see how this makes the Secretary's determination unreasonable. Almost any time a collective bargaining agreement between union and management results in payments into the pension plan from the employer, the payments can be described as a decision by the union membership "in its sole discretion" to receive increased pension benefits instead of increased wages. The line relating wages and pension benefits must be drawn somewhere, and the Secretary did not act unreasonably in drawing it where he did. The Secretary's action in distinguishing the actual results in these alternative situations was reasonable, and was correctly respected by the Court of Claims. See *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153–154; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Crawford* v. *United States*, 376 F. 2d 266, 179 Ct. Cl. 128, certiorari denied, 389 U.S. 1041.

[13] There is no allegation that the benefits were actually paid out to the union members in the form of wages—subject to income taxation—and that the union members then paid them back into the pension plan. See 26 U.S.C. 3401.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1968.

APPENDIX

The relevant provision of the Classification Act of 1949, 5 U.S.C. 1082 (1964 ed.) is as follows:

> Section 1082(8):
> This chapter * * * shall not apply to—
>
> * * * * *
>
> (8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

The relevant provision of the Federal Employees Pay Act of 1945, 5 U.S.C. 946 (1964 ed.) is as follows:

> § 946. Vessel employees
> Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, vessel employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry.

The relevant provision of the Civilian Marine Personnel Instructions (CMPI 531.1–3), are as follows:

> 1–3 Policy On "Prevailing Rates and Practices."
> a. Determination.—Prevailing pay rates and practices in the maritime industry are ascertained by analysis of:
> (1) administrative practices concerning marine personnel employed by commercial maritime carriers,

(2) agreements and contracts between commercial carriers and maritime labor unions, and

(3) current marine positions throughout the maritime industry.

Specific industry rates and practices *per se* are not always directly transferable to MSTS marine positions because of variations among pay rates and practices in the maritime industry itself, and differing pay practices between industry and the government. However, the Navy Department follows prevailing rates and practices as closely as is consistent with the public interest.

b. Application of benefits.—Where fringe benefits exist in the maritime industry, a determination of their application to MSTS positions has been made on:

(1) whether the benefits are general in the industry,

(2) whether their incorporation is in the public interest,

(3) whether exclusion of a particular benefit is sufficiently compensated for by application of privileges and benefits accorded civil service employees not matched in the industry, and

(4) whether the benefits are fair and reasonable.

c. Authorization.—Marine pay rates and practices as finally derived in accordance with a and b above are applied, consistent with the public interest, upon establishment of the fact that they are prevailing rates and practices. The Secretary of the Navy will authorize new or revised pay rates and practices to become effective concurrently with corresponding changes in the industry whenever administratively possible. No application of industry pay rates and practices shall be made prior to specific authorization by the Secretary of the Navy.

U.S. GOVERNMENT PRINTING OFFICE: 1968